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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 612

UNITED STATES OF AMERICA *ex rel.* JOSEPH MARCIAL, a/k/a JOSEPH JOHNSON,

Respondent,

against

EDWARD M. FAY, Warden, Greenhaven Prison, Stormville, New York,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

JOHN R. DAVISON
Solicitor General

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL FREYBERG
Assistant Attorney General

GEORGE K. BERNSTEIN
Deputy Assistant Attorney General
Of Counsel

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Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Edward M. Fay, Warden of Greenhaven Prison, State of New York, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to review a judgment of that court, entered on August 16, 1957, which (a) reversed an order of the United States District Court for the Southern District of New York, made on June 28, 1957, denying respondent's petition for a writ of habeas corpus, and (b) remanded the case to the District Court for a hearing.

Opinion Below

The majority and dissenting opinions of the United States Court of Appeals for the Second Circuit, are reported in 247 F. 2d 662.

Jurisdiction

The date of the final judgment reversing the District Court sought to be reviewed herein is August 16, 1957.

This is a final judgment of the United States Court of Appeals.

The petitioner has no further appellate remedy other than certiorari to this Court.

Jurisdiction of this Court is invoked under Title 28, United States Code § 1254, which provides, in part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Questions Presented

The Federal questions of substance which have been raised by the decision of the Court of Appeals, are:

(1) Whether a denial of the right to appeal *in forma pauperis* from the refusal to grant an application for a writ of error *coram nobis* and subsequent denial of certiorari by this Court is to be deemed an exhaustion of State Court remedies within the meaning of § 2254 of Title 28, United States Code; and

(2) Whether the fact alone that a defendant in a state court, accused of a non-capital crime, alleges that he had no assigned counsel at the time of a plea of guilty, in substitution for a plea of not guilty by reason of insanity, and of sentence, and that he did not comprehend the proceedings, presents a triable question of lack of due process so as to justify review of the State Court proceedings in a District Court Hearing; and

(3) Whether the writ of habeas corpus is available in the federal courts to challenge a state court sentence as a second offender not because of any claim that any infirmity attended the disposition of the second case but solely because of alleged failure of due process in the *first* state conviction and sentence upon which the multiple sentence was predicated, where the state court affords a remedy to test the first conviction directly.

The questions are novel, transcend local interest, and are national in scope, presenting implications, which if sustained, would confuse and obscure an important and previously unquestioned area of Federal law.

Statute Involved

Title 28, United States Code, Section 2254: State Custody; remedies in State Courts:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemd to have exhausted the remedies if he has the right under the law of the State to raise, by any available procedure, the question presented."

Statement of Case

Petitioner herein seeks a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the order of that Court sitting *en banc* made August 16, 1957, reversing and remanding an order of the United States District Court for the Southern District of New York (John F. X. McGohey, J.) made on June 28, 1957, denying relator's petition for a writ of habeas corpus. Two of the five Judges dissented as respects the disposition of the merits.

Respondent is presently incarcerated in Greenhaven Prison, Stormville, New York, pursuant to a sentence of from ten to thirty years, as a second felony offender, imposed by the County Court of Kings County (Leibowitz, J.), on June 6, 1949, after conviction upon a plea of guilty to the crime of robbery in the second degree. On June 8, 1949, he was received at Sing Sing Prison, Ossining, New York, owing 3 years, 1 month, and 3 days on a previous sentence. Respondent's maximum sentence expires on March 28, 1982. Respondent's earliest possible date of parole is January 2, 1959. Had respondent been sentenced as a first offender, his maximum sentence could have been for a term of 15 years (New York Penal Law, Sec. 2127), which sentence would not expire until 1964.

On October 10, 1934, respondent was indicted for robbery in the first degree, grand larceny in the second degree and assault in the second degree, the total maximum possible sentences on these crimes amounting to 40 years. He was represented by assigned counsel, Joseph B. Margolin and at that time pleaded not guilty. On October 24, 1934, re-

spondent appeared in the County Court of Kings County, New York, with his attorney and changed his plea of not guilty to "not guilty with a specification of insanity". Apparently respondent objected to this amended plea and after a "brief period of disputation" ceased to be represented by Margolin.

Following this plea, the Court appointed a lunacy commission to examine respondent. This commission reported the following findings:

> "Pursuant to an order made and entered in the above entitled proceeding on the 24th day of October, 1934, by the Honorable Alonzo G. McLaughlin, County Judge; and pursuant to Section 658 of the Code of Criminal Procedure, appointing the undersigned as Commissioners to examine into the mental condition of the above-named defendant, Joseph Johnson, under indictment for the crime of Robbery First Degree said commissioners respectfully submit their report to the court as follows:
>
> "It is the unanimous opinion of the undersigned that the said defendant was sane at the time of the commission of the alleged crime and is sane at the present time and able to confer with counsel in the proper preparation of his defense.
>
> WILLIAM SELIGMAN
> LOUIS EILPERIN
> JULES M. NOVA
>
> Dated: Brooklyn, New York
> November 3, 1934"

On November 14, Judge McLaughlin ordered the report filed and the defendant remanded for trial. The plea of guilty to robbery in the second degree followed on December 17, 1934.

On January 11, 1935 the defendant was sentenced in the Kings County Court to imprisonment for a term of from 7½ to 15 years. It is this conviction which was the basis of his sentence as a second offender in 1949.

Respondent is contending that the 1935 conviction for robbery in the second degree in the Kings County Court was invalid because, he asserts, the Court failed to advise him of his right to counsel or to assign counsel to him at the time of his plea and upon sentencing.

Marcial has previously sought to invalidate the 1935 conviction in the New York State courts. An application for a writ of error *coram nobis* in the County Court of Kings County was denied by the Hon. Louis Goldstein on March 14, 1951. Respondent alleges that he filed a notice of appeal to the Appellate Division of the New York Supreme Court, Second Judicial Department, and moved to prosecute his appeal *in forma pauperis*, which motion was denied on September 14, 1951. The appeal was dismissed on December 3, 1951, for lack of prosecution. Another application to the court of original jurisdiction for *coram nobis* was denied on December 2, 1955, by the Hon. Samuel J. Leibowitz. Respondent filed a notice of appeal to the Appellate Division and moved to prosecute his appeal *in forma pauperis*, which motion was denied on January 23, 1956. The appeal was dismissed on September 24, 1956, for lack of prosecution. Respondent's application to this Court for certiorari was denied on June 4, 1956 (351 U. S. 968).

Thereupon, respondent applied for a federal writ of habeas corpus in the United States District Court, Southern District of New York. His application was denied by Judge John F. X. McGohey in a memorandum decision dated June 28, 1956 and entered on October 28, 1956, which reads:

> "The petition shows on its face that the petitioner has not exhausted his State Court Remedies. See

U. S. ex rel. Kalan v. Martin, 2 C. 205 F. 2d 514; U. S. ex rel. Rheim v. Foster, 2 C. 175 F. 2d 772.

"The petition is dismissed on its merits. Writ denied."

Respondent appealed this denial to the United States Court of Appeals for the Second Circuit, which Court, reversed and remanded (247 F. 2d 662).

Reasons for Granting the Writ

I. Compliance with the jurisdictional requirement of exhaustion of state remedies is not shown by the State Court's denial of *forma pauperis* on appeal from a post-conviction state court remedy.

Section 2254 of Title 28, United States Code, requires proof of exhaustion of state remedies as a condition precedent to obtaining a federal writ of habeas corpus to review a state conviction. The jurisdiction of the District Court in these cases depends upon compliance with this statutory requirement and, until the disposition was made below in this case, the rule was firmly settled that this jurisdictional requirement could not be avoided. *Darr* v. *Burford*, 339 U. S. 200; *Ex parte Hawk*, 321 U. S. 114. Accordingly, where a prisoner fails to pursue the appellate remedy offered to him by the State from the denial of *coram nobis* applications or otherwise, the Second Circuit itself has held (see e.g., *United States ex rel. Kalan* v. *Martin*, 205 F. 2d 514), that the District Court lacks jurisdiction to entertain a federal habeas corpus writ.

In the instant matter, as in *Kalan*, the prisoner instituted an appeal from the two orders denying *coram nobis* (the first one applied for 15 years after the conviction) and unsuccessfully sought leave to prosecute these appeals as a poor person. As a result he did not prosecute either appeal and they were dismissed.

The question arising in this case is not whether the State was under a duty to permit him to prosecute these appeals as a poor person. That was a question which could have been, but was not, raised by the respondent either in the State Court or in his application for certiorari (which was denied by this Court). The petitioner-prisoner in *Griffin* v. *Illinois*, 351 U. S. 12, did raise the question. The prisoner must establish that he exhausted State remedies available to him and the statute affords no authority to the District Court to excuse non-compliance with this requirement.

The Court below stated that this Court's opinion in *Griffin*, required it to overrule *U. S. ex rel. Kalan* v. *Martin*, *supra*, and hold that the prisoner had exhausted state remedies so as to confer jurisdiction upon the District Court. But nothing in *Griffin* required or even permitted such a conclusion. In *Griffin* an appeal from a judgment of conviction was involved. In Illinois, a convicted defendant who cannot purchase a transcript of the trial minutes can not obtain a "full direct appellate review." It appears that in Illinois there were two types of appeals: one was by a "mandatory" record and the other by a bill of exceptions. The first was prepared by the clerk, but did not bring up for review trial errors. The second, which brought up for review all trail errors, required either a stenographic transcript of the proceedings at the trial or a condensed narrative thereof. But as conceded by Illinois, the latter was almost impossible to obtain, with the result that "[t]here isn't any way that an Illinois convicted person * * * can obtain a bill of exceptions without paying for it." *Griffin* v. *Illinois*, id. at 14 n.4. This is the concession referred to by the Supreme Court where it stated that "Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors." It is therefore clear that the "adequate appellate review" mentioned in the

Griffin case refers to the completeness of the record available to the appellate court for review. The court added (at page 20):

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court [of Illinois] may find other means of affording adequate and effective review to indigent defendants."

Moreover, this Court pointed to New York as one of the states that provides a means of adequate appellate review from a criminal conviction to an indigent defendant who cannot pay for it and cited Section 456 of the Code of Criminal Procedure as authority therefor. But the *Griffin* case was not concerned with the exhaustion of State remedies requisite to a federal habeas corpus proceeding. Nor do we find any other cases which support the conclusion reached below.

It is our firm submission that the Court of Appeals has adopted a rule which is contrary to the statute and to the decisions of this Court. *Darr* v. *Burford*, 339 U. S. 200; *Ex parte Hawk*, 321 U. S. 114. In any event, the question of the proper construction of the statute as it respects the jurisdiction of the District Court to entertain the writ of habeas corpus without proof of actual exhaustion of state remedies is one which should be passed upon by this Court.

II. There was no due process question presented below.

The decision of the Court of Appeals, if allowed to stand, will confuse and obscure a vital and previously settled area of Federal Law, and will require the Federal Courts to review State Court proceedings in cases involving no

Federal question. The decision of the Court of Appeals necessarily entails the intervention of the Federal Courts into the administration of criminal justice in the state courts, in matters heretofore recognized as solely within the domain of the states, thereby weakening the traditional and Constitutional separation of powers repeatedly espoused by this Court.

The discretionary power of this Court is invoked because of the far-reaching effect of the decision of the Court of Appeals, especially in view of the multitude of writs of habeas corpus sought each year in the District Courts, on the ground of lack of counsel in non-capital state cases.

As was recognized even by the majority of the Court of Appeals:

> "True it is that where a conviction in a non-capital case has been based upon a plea of guilty in a state court, a mere allegation that petitioner was of low intelligence and neither had nor was offered a lawyer at the time the plea was entered will not suffice."

The law is clear that in non-capital state convictions, there is no fundamental right to representation by counsel unless there are special circumstances which show that without counsel a defendant could not receive a fair and adequate hearing. *Bute* v. *Illinois*, 333 U. S. 640; *Betts* v. *Brady*, 316 U. S. 455.

As this Court itself pointed out in *Quicksall* v. *Michigan*, 339 U. S. 660, 666:

> "At least 'when a crime subject to capital punishment is not involved, each case depends on its own facts.' *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441; *Betts* v. *Brady*, 316 U. S. 455, 462. To invalidate a plea of guilty the prisoner must establish that 'for want of benefit of counsel an ingredient of unfairness ac-

tively operated in the process that resulted in his confinement.' *Foster* v. *Illinois*, 332 U. S. 134, 137; see *Gibbs* v. *Burke*, 337 U. S. 773, 781."

There has been wholly lacking any showing of fundamental unfairness in this case. Respondent has coupled a claim of inability to comprehend the proceedings with an unsubstantiated implication of insanity and has utterly failed to comply with the prerequisite of a federal question heretofore established in this Court.

Indeed, the record in this case is wholly devoid of any basis for finding a due process question which required the District Court to hold a hearing. Here the respondent was not only advised of his right to counsel, but counsel was actually furnished him by the state. Respondent discharged his counsel and elected to proceed by himself—successfully getting the state to accept a reduced plea of guilty to robbery in the second degree.

The respondent has in effect, asserted: (1) That his court-appointed counsel of 1934 felt that he was not sane 2 months prior to his conviction; (2) that at the time of the proceedings he was 22 years of age, had "terminated his formal schooling in the 6th grade" and, "was subnormal in intelligence and the legalistic proceedings confronting [him] were too complex for him to competently comprehend". The implication drawn therefrom by respondent's counsel in the Court of Appeals was that respondent was *non compos mentis* at the time of the 1934 proceedings. The Court of Appeals, in deciding the case below, did not attempt to evaluate this claim, but satisfied itself in citing, with approval, the case of *Massey* v. *Moore*, 348 U. S. 105.

The reliance of the majority upon *Massey* v. *Moore*, is totally unjustified. There, the defendant had been confined to the psychopathic hospital of the State Prison for several months prior to the trial, and for part of that

time, he was kept in a cell block reserved for the most violent inmates. It was not until four days before the trial that he was removed from a strait-jacket and shortly after his conviction and sentence, Massey attempted suicide. He was then re-committed to the psychopathic ward where he was confined for several additional months. There is no similarity in law or fact between the *Massey* case and the one under consideration.

The Majority Opinion below appears to infer mental incompetence from the fact that a lunacy commission was appointed in the State Court. As pointed out in the dissenting opinion, although this inference is difficult to comprehend,

> "* * * any speculation favorable to Marcial from the appointment alone is precluded by the fact that the commission found him 'sane * * * at the present time * * *' and under New York law this means it found that he could 'understand the proceedings and make his defense.' *People* v. *Nyhan*, 171 N. Y. Supp. 466, 467 (Sup. Ct. Mon. 1916). Thus the very issue before us was before the commission. It found adversely to Marcial and I do not see how my brethren of the majority can rely on the fact that a commission was appointed for any inference favorable to the defendant on that very question. If anything, these facts would seem to indicate that the plea of not guilty with specification of insanity was a legal maneuver for which there was no basis."

Prior to the contention in the Court of Appeals, nowhere, throughout the history of this case, in both the State and Federal Courts is there any allegation that Marcial was insane or of unsound mind at the time of his 1934 plea. In fact, in respondent's petition to the District Court, he stated that "he earnestly believed that he was not insane." He cited not a single fact or circumstance

which cast the slightest suspicion as to mental inferiority at any time of his life including the period of his 1934 conviction. As pointed out by Judge Lumbard in his dissenting opinion:

> "Unfortunately, it is true that a large proportion of those who stand at the Bar of criminal justice are of subnormal intelligence: That is undoubtedly one of the principal reasons why they find themselves there."

Petitioner's background of criminal activities, affords a relevant insight into his mental capacity at the time of his 1934 conviction and tends to negate a finding of those special circumstances of fundamental unfairness which would require representation by counsel. He pleaded guilty to the felony in question when he was almost 23 years of age and no stranger to the criminal courts of New York State. By the time he reached the age of 17 he had thrice been adjudged a juvenile delinquent and once a wayward minor, having spent 9 months in the City reformatory on the latter charge.

During the years following he had several encounters with law enforcement authorities and in 1931 pleaded guilty and was convicted of petit larceny, having been indicted for grand larceny and receiving stolen property. Less than a year later he again pleaded guilty to a reduced charge of petit larceny after having been indicted for attempted grand larceny in the second degree.

There has been no charge of actual unfairness in this case nor has there been an allegation that petitioner was under either physical or mental coercion. Assuming *arguendo*, although the record raises questions even on that score, that appellant had no counsel upon his plea and sentencing there is no foundation for the inference that he was naive and groping in unfamiliar surroundings. On the contrary, by 1934 his record shows

him to have been a veteran of over six years experience in the criminal courts of New York.

There has been an absolute failure by petitioner to show or present any proof meeting the burden of *Quicksall* v. *Michigan*, cited *supra*, and *Foster* v. *Illinois*, 332 U. S. 134. Furthermore, Judge Lumbard in his dissent distinguishes three of the cases relied on by the majority, i.e., *Herman* v. *Claudy*, 350 U. S. 116; *Massey* v. *Moore*, 348 U. S. 105 and *Uveges* v. *Pennsylvania*, 335 U. S. 437. Thus, it is difficult to understand the rationale behind the decision of the Court of Appeals by which it broadened the established rule to allow a mere claim of inability to comprehend the proceedings, coupled with an unsubstantiated implication of insanity, to enable the Federal Courts to intervene in State Court proceedings.

By its decision, the Court of Appeals has opened the way to repeated intervention of the federal courts into the administration of criminal justice in the State courts. This Court has heretofore recognized that the criminal court decisions of the State courts must remain inviolate unless there is a showing of fundamental unfairness. The definition of fundamental unfairness has likewise previously been delineated to exclude allegations of mere inability to comprehend. The unique and momentous effect of the decision of the Court of Appeals will be to obscure the line between federal and State criminal jurisdiction, weakening the traditional and constitutional separation of powers repeatedly urged by this Court.

The practical effect of this decision in light of the number of federal writs of habeas corpus sought each year in the District courts of New York alone, will be to place the federal Courts in the position of ordinary Appellate Courts overseeing the decisions of the State Courts, a concept obviously repugnant to our federal system and the subject of innumerable decisions on that point. See *Brown* v. *Allen*, 344 U. S. 443.

As this Court stated in *Malinski* v. *New York*, 324 U. S. 401, 418:

> "We must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws, and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes."

III. Respondent could not employ federal habeas corpus to test the first conviction, for which he was no longer in state custody, because of the circumstance that such conviction made him a multiple offender, when he was sentenced for a second felony conviction.

New York provides a remedy by a writ of *coram nobis* to test the constitutional validity of a conviction. Respondent has completed his sentence on the 1935 conviction. While still serving this sentence, respondent employed this writ of *coram nobis* but, at that time, did not seek *certiorari* in this court or attempt to enter the Federal District Court. It was only while serving the *second* sentence that respondent, having again been denied a writ of *coram nobis*, sought *certiorari*, and then entered the Federal District Court.

New York provides that upon the presentation of a certified copy of a prior conviction and proof of identity, a convicted defendant's sentence will be increased (New York Penal Law, Sec. 1941). In such event, the state gives full faith and credit to the prior conviction. This is so whether the first conviction occurred in New York or elsewhere. We know of no basis for placing upon the state the duty to defend the first conviction when the prisoner is in custody only upon the subsequent conviction and the federal writ concerns only the sentence under this subsequent convic-

tion. This is especially true where an adequate remedy was afforded the prisoner while he was serving the first sentence to assail it by a writ in the state courts, as here, and to employ at that time the federal writ. This, we believe, is the rationale of *Gayes* v. *New York*, 332 U. S. 145, which the Court of Appeals below failed to deal with in the opinion.

If the procedure provided for by this case be authorized, then New York must first investigate the due process character of every prior conviction, whether the conviction occurred in New York or elsewhere, before sentencing a defendant to a longer sentence as a multiple offender. Moreover, the incongruous result of such procedure is that if New York is unable after the long lapse of time or lack of cooperation from the authorities in other states to overcome the multitude of characterizations of such a prior conviction, the second sentence can be set aside upon a federal writ because of the alleged lack of due process in the first conviction, while such conviction otherwise remains undisturbed. See e. g. *United States ex rel. Turpin* v. *Snyder*, 183 F. 2d 742 (upon the merits, the first Wisconsin conviction was upheld at 190 F. 2d 252, cert. den. 342 U. S. 872); *United States ex rel. Smith* v. *Jackson*, 234 F. 2d 742. (Prisoner escaped while serving the prior sentence in another state.)

No cases in any other Circuit have been cited as reaching the same conclusion. We believe this is an unauthorized improvisation of the Second Circuit to provide a remedy where there is none simply because of the failure of the prisoner to exercise due diligence while serving the prison sentence.

CONCLUSION

For all of the foregoing reasons petitioner respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment reversing the denial of respondent's application for a writ of habeas corpus.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

JOHN R. DAVISON
Solicitor General

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL FREYBERG
Assistant Attorney General

GEORGE K. BERNSTEIN
Deputy Assistant Attorney General